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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court (A. P. 179) is reported officially at 69 Wis. 2d 200, and unofficially at 231 N.W. 2d 206 and 89 LRRM 2929. The Wisconsin Circuit Court's opinion affirming the Order of the Wisconsin Employment Relations Commission (hereinafter WERC) (A. P. 171) is not reported. The findings of fact, conclusions of law, order and memorandum accompanying findings of fact, conclusions of law and order of the WERC are not officially reported. (A. P. 124)

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered June 30, 1975. An order denying rehearing was issued September 30, 1975 (A. P. 207). The notice of appeal to the United States Supreme Court was filed December 5, 1975. Appellants' request for extension of time to docket appeal was granted December 24, 1975. Appellants' Jurisdictional Statement was filed January 5, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (2). This Court noted probable jurisdiction March 1, 1976.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I of the Amendments to the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of Article XIV of the Amendments to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein They reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any personwithin its jurisdiction the equal protection of the laws."

WISCONSIN STATUTES INVOLVED

1 Wisconsin Statutes, Sec. 111.70 (2), p. 2143 (1971), provides:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. The commission shall declare any fair-share agreement suspended upon such conditions and for such time as the commission decides whenever it finds that the labor organization involved has refused on the basis of race, color, creed or sex to receive as a member any employe of the municipal employer in the bargaining unit involved, and such agreement shall be made subject to this duty of the commission. Any of the parties to such agreement or any municipal employe covered thereby may come before the commission, as provided in s. 111.07, and ask the performance of this duty.

1 Wisconsin Statutes Sec. 111.70 (3) (a) 1 and 4, p. 2143 (1971), provides:

> (3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).
>
> * * *
>
> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

Additional relevant statutes are printed in the Appendix to this Brief (hereinafter B. A. P. _____). 29 USC 141 (B.A.P. 1) 29 USC 157 (B. A. P. 1, 2) 29 USC 158 (B. A. P. 2-8) 29 USC 159 (B. A. P. 8-10) 111.70 (1) (a) (b) (c) (d) (h) (j) (k) (m) (n) (B.A.P. 10-12) 111.70 (3) (B.A.P. 12-15) 111.70 (4) (a), (b), (d) 1,2 (B.A.P. 15-17).

QUESTION PRESENTED

Whether a state labor statute may constitutionally require that a duly elected board of education refuse to permit teacher employees other than representatives of the certified bargaining representative the opportunity to appear, speak and present a petition to the board at a regular board meeting during the portion of the meeting devoted to public appearances when the appearance, speech and petition relate to matters subject to collective bargaining.

STATEMENT OF CASE

The Appellant, City of Madison, Joint School District No. 8, et al, operates the school system of said City and has its principal office at 545 West Dayton Street, Madison, Wisconsin. The Board of Education of the District is an agent of the District and is charged with the possession, care, control and management of the property and affairs of the District. (A. P. 125) The Board of Education is composed of seven (7) members, elected on a rotating basis for three year terms.

The Appellee, Wisconsin Employment Relations Commission, is an administrative body charged with the responsibility of administering statutory policy with respect to public and private employer-employee relations. §111.70 *Wis. Stats.* (1971)

The Appellee, Madison Teachers Incorporated, is a labor organization and the exclusive collective bargaining representative of the teachers of the District (A.P. 125, 126).

The Board of Education, hereinafter "Board", and Madison Teachers Incorporated, hereinafter "MTI", have entered into a series of collective bargaining agreements covering wages, hours and conditions of employment for bargaining unit personnel since 1966. (A. P. 126) The agreement, having a term commencing January 1, 1971, and ending December 31, 1971, included among its provisions the following in Article IIA entitled Conference and Negotiation:

> 2. (d) If matters which are proper subjects of negotiations are brought, whether in the form of a grievance, petition or otherwise, to the attention of either of the parties to this agreement by any individual, group of individuals or organization other than the other party to this agreement or its duly authorized agents, such latter party shall be punctually informed of such action." (A. P. 126-27)

Negotiations between the Board and MTI for a successor agreement began on or about January 21, 1971. (A. P. 127) The negotiations between the parties included discussion of inclusion of a "fair share" agreement in the 1972 collective bargaining agreement. (A. P. 127)

The Wisconsin Statutes dealing with municipal employment labor relations were significantly amended effective November 11th by Chapter 124, Laws of 1971. The amendments were patterned after the National Labor Relations Act. The amendments imposed a duty to bargain on Wisconsin municipal employers. (Brief Appendix hereinafter (B. A. P. 10-17) The amendments also permitted

municipal employers and the majority representative of its employees to enter into a "fair share" agreement as defined by Section 111.70 (1) (h) *Wis. Stats.* 1971. (B.A.P. 11) MTI submitted a "fair share" proposal which conformed with the Statutes on November 17, 1971. (A. P. 128)

The number of unresolved issues between the two parties had been reduced to approximately thirteen (13) by November of 1971. Among the major unresolved issues were "fair share" and binding arbitration of non-renewal of teacher contracts and teacher dismissals. (A. P. 128)

In November, 1971, Ralph K. Reed and Albert Holmquist, teachers employed by the District, neither of whom were members of MTI, drafted a letter concerning fair share. (A. P. 129, 135) They mailed the letter on November 14, 1971 to all teachers employed by the District. (A. P. 129) They received approximately 200 replies to the letter, the majority of which were favorable to their position on fair share. (A. P. 129)

Mr. Reed and Mr. Holmquist called a meeting of those teachers who indicated they would work actively against any "fair share" proposal. (A. P. 129) The meeting was held on December 2, 1971. (A. P. 129) The group prepared a petition and an accompanying letter. (A. P. 129, 136-140) They also formulated plans for circulation of the documents in the schools December 6, 1971. (A. P. 129) They wished to present the results of the survey to Madison Teachers Incorporated and the Board of Education on the evening of December 6, 1971. (A. P. 137)

The petition was circulated in the schools in non-working areas on non-working time with the knowledge of at least two principals. (A. P. 129, 182) Mr. Reed also

distributed a letter to teachers of Van Hise Middle and Elementary Schools through use of teacher mail boxes. (A. P. 129, 140-141)

A regular meeting of the Board of Education was scheduled for the evening of December 6, 1971. (A. P. 130) The officers and representatives of MTI were present at the meeting. (A. P. 130) Just prior to the Board meeting, John Matthews, the Executive Director of MTI, met Board member Yelinek in the School Board parking lot. Mr. Matthews informed Mr. Yelinek that Albert Holmquist would attempt to speak to the Board during the public appearance portion of the meeting. Mr. Yelinek told Mr. Matthews he would take care of it. (A. P. 183)

A portion of each regular meeting is devoted to public appearances. (A. P. 130) A number of individuals were allowed to speak to the Board that evening. (A. P. 130, R. P. 141) The president of MTI was allowed to speak. (A. P. 130) At the conclusion of his remarks he presented to the board a statement containing the signatures of between 1300 and 1400 teachers setting forth that: "We, the undersigned, wish the parties to resume negotiations and reach agreement as quickly as possible." (A. P. 130)

Albert Holmquist also completed a registration form indicating that he wished to speak to the Board of Education. (A. P. 97) He did not indicate what he wished to speak about on the form. (A. P. 98) Mr. Holmquist was permitted to speak after the president of MTI. Mr. Holmquist commenced his remarks as follows:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education,

> as I already have the Madison Teachers Incorporated. about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package." (A. P. 130)

He then read the text of the petition that had been circulated among the teachers of the District dated December 6, 1971.

> To: Madison Board of Education, Madison Teachers Incorporated. We, the undersigned, ask that the fair-share proposal (Agency shop) being negotiated by the Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal. 4) The results of this written ballot be made public.
>
> We feel this study necessary because neither the Board's negotiators who have placed entirely too much emphasis on this point, nor Madison Teachers Incorporated which speaks euphemistically about the "whole package" and therefore is not issue specific... Neither have properly addressed the serious issue of fair share and agency shop. We find much confusion in the proposal as it stands and even more on the part of the teachers' interpretations of it. For evidence, 417 teachers from 31 schools which represents 53% of the total number of these facilities of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented

clearly to all teachers, and more importantly to the general public to whom we all are responsible. We ask simply for communication, not confrontation." (A. P. 130-31)

At the conclusion of Mr. Holmquist's remarks, Mrs. Doyle, the president of the Board of Education asked Holmquist, "Do you intend to communicate these petitions to the Board when you have them?" Holmquist replied in the affirmative. (A. P. 131)

No other member of the Board of Education spoke to Mr. Holmquist on the matter. (A. P. 131)

After the regular meeting, the Board of Education went into executive session and discussed the unresolved collective bargaining issues. (A. P. 131-32) A negotiation session had been scheduled for December 7, 1971. (A. P. 132) The board adopted the following resolution after their discussion:

> "It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and not including agency shop; if the MTI does *not* accept this as a total package, the offer of arbitration is withdrawn." (A. P. 132)

Negotiations between the Superintendent and Assistant Superintendent of Schools and the president and executive secretary of MTI continued as previously scheduled on December 7, 1971. (A. P. 132) The representatives of MTI were given the resolution adopted by the Board. Discussions concerning the Board's position and "fair share" took place during the meeting. (A. P. 132) In the afternoon of that day the parties reached tentative agreement upon MTI accepting the Board's proposal. (A.

P. 132) The tentative agreement was accepted as the agreement by both parties on December 14, 1971. (A. P. 132)

On January 6, 1972, Madison Teachers Incorporated filed a complaint with the Wisconsin Employment Relations Commission (hereinafter WERC) alleging that the Board of Education committed a prohibited labor practice when it listened to Mr. Holmquist at its meeting on December 6, 1971. (A. P. 3-7) The Board of Education denied the allegation and raised several affirmative defenses. (A. P. 7-9, 10) A hearing on the complaint was conducted by the WERC on February 28, 1972. (A.P. 9) The WERC issued its findings of fact, conclusions of law, order and memorandum accompanying findings of fact and conclusions of law and order on September 13, 1972. (A. P. 165) The WERC determined that the petitioners violated their duty to bargain in good faith with Madison Teachers Incorporated when the Board listened to Mr. Holmquist and thereby committed a prohibited labor practice in violation of Sections 111.70 (3) (a) 1. and 4. of the Wisconsin Municipal Employment Relations Act. (A.P. 133). The WERC ordered the Board to immediately cease and desist from permitting employees other than the representatives of MTI to appear and speak at meetings of the Board of Education on matters subject to collective bargaining between Madison Teachers Incorporated and the Board. A petition seeking review of the decision of WERC was filed October 13, 1972, in the Circuit Court of Dane County (A. P. 134).

The Circuit Court affirmed the findings and order of the WERC (A. P. 178). The Court concluded: "... that denying a representative of a minority of the bargaining

unit employees the right to appear at a public meeting of the Board and to speak to the Board on mandatory subjects of bargaining does not infringe upon the right of freedom of expression or the right to petition one's government as guaranteed by the Wisconsin and United States Constitutions." (A. P. 175).

The Board appealed to the Wisconsin Supreme Court November 9, 1973.

The Wisconsin Supreme Court delivered its opinion June 30, 1975. Justice Day, writing for the majority, indicated the basic question in the case was whether the activities of the Board at its public meeting constituted bargaining with other than the exclusive representative of the Board's teacher employees. He reasoned that the Board negotiated with an individual other than the exclusive representative of its teachers since it permitted Mr. Holmquist to influence the decision of the Board on a matter subject to collective bargaining. (A. P. 193). Justice Day concluded that the infringement upon the freedom to speak and petition permitted by the WERC and Circuit Court Orders was within the limits imposed on the restriction of those rights by United States Supreme Court decisions. (A. P. 189). Three justices dissented from the majority decision on Constitutional grounds. (A. P. 206).

The Board's motion for rehearing was denied September 30, 1975. (A. P. 207).

On March 1, 1976 this Court noted probable jurisdiction of the School Board's appeal from the Wisconsin Supreme Court.

SUMMARY OF ARGUMENT

I.

This case presents the issue of the degree to which First Amendment rights to speak and petition one's government may be abridged in the alleged pursuit of stable, peaceful and orderly labor relations in the public sector.

A. The critical importance of the rights guaranteed by the First Amendment to the vitality of a democratic system of government is unquestioned. This Court has consistently recognized and reaffirmed the importance of maintaining a system of free expression. The Court has insisted that statutes punishing the use of words be carefully drawn and/or authoritatively construed to punish only unprotected speech and must not be susceptible of application to protected expression. Prior restraints of pure speech activity are highly scrutinized since content control undercuts our commitment to open uninhibited debate on public issues.

Overbroad and vague regulations of speech activity are also constitutionally defective since they are incompatible with the maintenance of our system of self-government.

This Court has only sanctioned restrictions on the exercise of the liberties guaranteed by the First Amendment in extraordinary circumstances.

This Court has also reminded school boards of their commitment to promote and maintain a system of freedom of expression when dealing with students and employees.

In fact, recently this Court held that failure to recognize and respect the constitutional rights of individuals may result in personal liability to board of education members.

B. The principle of majority rule is the cornerstone of federal labor management relations statutes. This principle underlies an employee's statutory right to join, form and assist any labor organization or refrain from any such activity. Should a majority of employees in an appropriate unit join a labor organization, and it is certified as the exclusive representative, the employer is obligated to engage in collective bargaining with the exclusive representative. Thus, the exercise of the statutory option to establish a collective bargaining relationship merely replaces the employer's former privilege of bargaining with individuals or groups of individuals.

The Congress and this Court have recognized the importance of the "majority rule" principle to the vitality of industrial democracy in private sector labor relations and also the importance of limiting the scope of its application because of its potential impact on individual rights. The labor statutes therefore protect the right of all employees to communicate with their employers and the right of employees to communicate between themselves about their exclusive representative. The importance of these individual interests has also been confirmed by this Court.

The Wisconsin legislature enacted a municipal employment labor relations statute based on the Federal private sector model in 1971. Thus, the "majority rule" principle has been transferred to public sector employment. The Wisconsin Supreme Court has decided three cases

involving the scope of the majority rule principle in public sector labor relations. The Wisconsin Supreme Court has interpreted the "majority rule" principle which obligates employers to bargain solely with the exclusive representative of their employees as mandating that school boards at public meetings refuse to listen to teachers other than representatives of the exclusive bargaining representative on matters subject to collective bargaining. The basis of these holdings rests on the assumption that listening to teachers other than representatives of the exclusive bargaining representative constitutes bargaining with that individual in derogation of the rights of the exclusive representative.

II.

The Wisconsin Supreme Court's reconciliation of First Amendment rights to freely speak and petition one's government, and the principle of majority rule in public sector labor relations, is heavily laden with constitutional infirmities.

A. The Court failed to recognize that the impact of adoption of majority rule on individual interests in public employment merely removes the former privilege of employers to bargain with employees individually. The restriction of bargaining to the exclusive representative clearly promotes stable, peaceful, and orderly labor management relationships. The court, however, equates mere listening with bargaining. This equation sanctions an impermissible intrusion on protected speech activities which is without basis even in private sector labor relations, let alone the public sector where employers have obligations to recognize and respect the constitutional

rights of their employees in addition to and superior to their obligations under the Municipal Employment Relations Act.

B. The Order of the Wisconsin Employment Relations Commission is also laden with constitutional difficulties. It obligates the school board to cease and desist from allowing certain teachers to speak at its public meetings on matters subject to collective bargaining. This Order imposes a prior restraint on pure speech activity in only one public forum based solely on content. It requires the school board to listen selectively on matters of public concern. This requirement of the Order is quickly recognized as abhorrent in a system founded on the unfettered interchange of ideas.

The Order is also overbroad and vague. It is overbroad in that it prevents mere *speaking* about instead of *bargaining* over matters subject to collective bargaining. It is vague in that it requires school boards to determine what are matters subject to collective bargaining. What subjects are within the term "conditions of employment"?

The Order is also defective since it requires the school board to depart from its constitutional obligation to handle access to its public forums in an evenhanded manner.

III.

A sound reconciliation of First Amendment liberties and the labor relations principle of "majority rule" in the public sector will at least provide that a public employer may always merely listen to any of its employees. This reconciliation has a firm foundation in labor law theory, and more importantly, reduces the possibility of an impermissible intrusion on our indispensable First Amendment liberties.

ARGUMENT

I

THIS CASE PRESENTS THE QUESTION OF THE EXTENT TO WHICH THE CONSTITUTIONAL RIGHTS OF INDIVIDUALS TO SPEAK AND PETITION THEIR GOVERNMENT MAY BE ABRIDGED IN THE NAME OF "MAJORITY RULE", THE STATUTORY CORNERSTONE OF LABOR-MANAGEMENT RELATIONS.

This case confronts the Court again with the duty our system places on the Court to say where an individual's freedom ends and the state's power begins. That decision is always delicate, but more so where the usual presumption supporting legislation, as interpreted, is balanced by the preferred place given in our scheme to the great and indispensible freedoms secured by the First Amendment. The crucial importance of First Amendment liberties gives them a sanctity and sanction not permitting dubious intrusions. *Thomas v. Collins* (1945), 323 U.S. 516 (rehearing denied 323 U.S. 819).

A. The Fundamental Freedoms Guaranteed By The First Amendment Are The Cornerstone Of Our Democratic System Of Government.

"The right of an individual to freedom of expression in our society as guaranteed by the First Amendment is an integral part of the great intellectual and social movement which transformed the Western world into a society whose faith rested upon the dignity, the reason and freedom of the individual." Emerson, *Toward a General Theory of the First Amendment*, Random House, p. 1 (1966).

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. "Maintenance of a system of free expression is necessary (1), as a method of assuring individual self-fulfillment, (2), as a means of attaining the truth, (3), as a method of securing participation by the members of society in social, including political, decision making, and (4), as a means of maintaining the balance between stability and change in the society. Emerson, *supra*, p. 1.

The third function of a system of freedom of expression is to provide for participation in decision making through a process of open discussion, which is available to all members of the community. The right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically organized society. The crucial point, however, is not that freedom of expression is politically useful, but that it is indispensible to the operation of a

democratic form of government. "Once one accepts the premise of the Declaration of Independence — that governments derive their just powers from the consent of the governed — it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment." Emerson, *supra*, p. 10.

1. This Court has recognized the critical importance of preserving a system of free expression in order to insure the vitality of our system of self-government.

This Court has embraced the precepts of the traditional theory of freedom of expression. It has confirmed that the Constitutional protections of speech and petition were fashioned to insure unfettered interchange of ideas. *New York Times v. Sullivan* (1964), 376 U.S. 254. Freedom of speech lies at the foundation of a free society. *Shelton v. Tucker* (1960), 364 U.S. 479, and is the essence of self-government. *Garrison v. Louisiana* (1964), 379 U.S. 64. It has therefore been this Court's position to allow the widest room for discussion and the narrowest range for restriction, particularly when the right is exercised in conjunction with peaceable assembly.

This Court has also insisted that statutes punishing the use of words must be carefully drawn and authoritatively construed to punish only unprotected speech and must not be susceptible of application to protected expresssion. *Goodling v. Wilson* (1972), 405 U.S. 518.

Further, any system of prior restraint against expression bears a heavy burden against its constitutional validity. *United States v. Washington Post Co.* (1971), 403 U.S. 713. The essence of forbidden censorship is content control. This Court has refused to abide any restriction on expressive activity because of its content on the basis that such would undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. *Police Dept., City of Chicago v. Mosley* (1972), 408 U.S. 92.

Finally, this Court has declared, consistent with traditional theory of freedom of expression, that even where regulation serves a substantial governmental interest, the regulation must do so in a manner consistent with the equal protection clause. There is an equality of status in the field of ideas, and once a public forum is provided, the government must afford all points of view an equal opportunity to be heard. *Mosley*, 408 U.S. 92, 99.

The attainment of freedom of expression, however, is not the only aim of a good society. It is a basic element in the democratic way of life and as a vital process, it shapes and determines the ends of a democratic society. But it is not through this process alone that a democratic society attains its ultimate goal. Emerson, *supra*, p. 47. The United States Supreme Court, as above noted, has consistently recognized and reaffirmed the preferred place of the First Amendment freedoms in our democratic scheme. The Court is also vested with the delicate job of reconciling freedom of expression with the other values and objectives sought by our society.

The Wisconsin Supreme Court approached the reconciliation required by this case in the following manner.

> "What is required to overcome the constitutional prescriptions on abridgement of First Amendment rights has been variously described as, 'a clear and present danger that (the speech) will bring about the substantive evils that '(the legislature) has a right to prevent.' *Schenk v. United States* (1919), 249 U.S. 47, 52. Or ...'grave and immediate danger to the interests which the state may lawfully protect.' *West Virginia State Board of Education v. Barnett* (1943), 319 U.S. 624, 639. Somewhat more recently, the Court has refined its language into a balancing test. 'In each case (courts) must ask whether the gravity of the evil discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' *Dennis v. United States* (1951), 341 U.S. 494, 510." 69 Wis. 2d 200, 212; 231 N.W. 2d 206, 212 (1975). (A. P. 189)

2. *The Wisconsin Supreme Court's approach to reconciliation of values required by the facts of this case is critical since school boards have a duty to recognize and respect the constitutional rights of their students and employees and failure to do so may result in personal liability.*

This Court has informed boards of education that students and teacher employees possess constitutional rights similar to the general citizenry and reminded boards of education of their obligation to respect those

rights. *Tinker v. Des Moines Independent School District* (1969), 393 U.S. 503; *Pickering v. Board of Education* (1968), 391 U.S. 563.

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights, they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school in which they work, it proceeds on a premise that has been unequivocally rejected in prior decisions of this Court. ... It cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the citizenry in general." *Pickering* 391 U.S. at 568.

Furthermore, this Court recently held that members of boards of education who disregard the constitutional rights of individuals may be subject to personal liability. *Wood v. Strickland* (1975), 420 U.S. 308 (rehearing denied 421 U.S. 921).

Yet, the Wisconsin Supreme Court in deciding this case failed to consider the above precedents and their application to the facts of this case.

B. The Principle Of Majority Rule Is The Statutory Touchstone Of Labor-Management Relations.

The "majority rule" principle is basic to the collective bargaining approach to labor-management relations embodied in the Labor Management Relations Act. 29 USC §157, 29 USC §159a (1970). (B. A. P. 1, 2, 8, 9) The principle of "majority rule" is simply the statutory right of

a majority of employees through duly chosen "exclusive" representatives to govern on the employees' side of the employment relationship, not only for themselves but for individual employees and minority groups within an appropriate unit. This principle embodies the correlative duty of the employer to recognize this right in the "exclusive" representative chosen by the majority of his employees. Weyand, *Majority Rule in Collective Bargaining*, 45 Col. L. Rev. 556 (1945). See also Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers*, 123 U. Pa. L. Rev. 897 (1975). The selection of an "exclusive" collective bargaining representative by a majority of employees obligates the employer to bargain with that representative in respect to rates of pay, wages, hours of work, or other conditions of employment. 29 USC §159a (B. A. P. 8, 9) Further, this provision is coupled with the provision which specifies that it is an unfair labor practice for an employer to refuse to bargain collectively with the "exclusive" representative of his employees. 29 USC §158 (a) (1), (5). (B. A. P. 2, 3). These statutory duties and responsibilities are tempered by the right of any individual employee or group of employees to present grievances to their employer and the right of employees to join or assist any labor organization or refrain from doing so. 29 USC §159a, 29 USC §157. (B. A. P. 1, 2, 8, 9).

Thus, the nature of the collective bargaining relationship in the private sector turns upon *one*, the extent to which the term *"exclusive"* requires the employer to forego his former privilege of dealing directly with any individual employee or group of employees; *two*, the amount of the employer's business which the phrase "rates of pay, wages, hours of work or other conditions of

employment" requires him to include within his bargaining negotiations; and *three*, the character of the right preserved for the individual or group to join and assist, install or reject labor organizations, and present grievances to their employer. Weyand, *supra*, p. 559. Out of the answers to these questions emerges the structure of collective bargaining in the private sector of our economy.

Thus, "majority rule" replaces whatever rights an employer once had to bargain with individuals or groups by establishing a democratic procedure by which employees in an appropriate unit participate in making the decisions governing working conditions by voting as to which union shall represent them and by shaping the policies of that union through membership therein. Senator Wagner, who introduced the Senate bill which became the National Labor Relations Act, discussed "majority rule" on the floor of the Senate, stating:

> "Democracy in industry must be based on the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guarantee of political liberty that mankind has yet discovered." 79 Cong. Rec. 7571 (1935).

Further, Edwin E. Witte, Professor of Economics at the University of Wisconsin, in arguing that a "majority rule" provision must be included in the Wagner Act, explained the principle as follows:

> "In industrial government just as in political government, there has to be majority rule, when it comes to actual government... *the right to petition, the right to lay grievances before Congress, is a right that any individual, any group must have. Similarly, in an industrial government the right to petition, the right to lay grievances before the employer seems to me a right that every group should be accorded, and every individual,...* But if it comes to determining conditions of employment by making some kind of rules governing wages and hours, there obviously has to be determination on the basis of majority rule, or you have pure anarchy just as you would have in government." Hearings before Committee on Education and Labor on S. 2926, 73rd Cong., 2nd Sess. (1934) Pt. 1, p. 243. (Emphasis added).

The evidence is overwhelmingly clear that when a majority of employees in the private sector adopts a system of collective bargaining, the impact on individual employees goes no further than the removal of the former right of employees to bargain with their employer and the imposition of the duty on an employer to refrain from bargaining with any employee except the "exclusive" representative chosen by a majority of his employees.

1. *This Court has upheld the principle of majority rule in private sector labor relations.*

This Court conferred judicial sanction on the labor relations principle of majority rule in three early cases: *J. I. Case Co. v. NLRB* (1944), 321 U.S. 332; *Order of Railroad Telegraphers v. Railway Express Agency* (1944), 321 U.S. 342; and *Medo's Photo Supply Corp. v. NLRB* (1944), 321 U.S. 678.

In the more recent case *Vaca v. Sipes* (1967), 386 U.S. 171, the Court again made reference to the "majority rule" principle in labor relations when it stated:

"The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interest of all employees in a collective bargaining unit." *Vaca v. Sipes* 386 U.S. at 177.

This Court considered the extent to which the doctrine of "majority rule" subordinates the interests of individual employees in 1974. In *NLRB v. Magnavox* (1974), 415 U.S. 322 (rehearing denied, 416 U.S. 952), this Court held that the NLRB properly found that an employer violated the Labor Management Relations Act by maintaining a rule forbidding the distribution of literature in non-working areas during non-working time. Notwithstanding the exclusive representative's contractual waiver to any objections to the rule, the Court found that the place of work is a place uniquely appropriate for the dissemination of news concerning the bargaining representative and various options open to employees and so long as distribution is by employees to employees and so long as in-plant solicitation is on non-working time, banning of that solicitation seriously might dilute the rights of employees to form, join and assist labor organizations or to refrain from such activity.

Thus, the statutory labor relations principle of "majority rule" sanctioned by the Supreme Court is tempered by the rights of individuals to present grievances to their employer, and the right of employees to change their representative at appropriate times. It follows the labor relations "majority rule" principle was never intended to prevent communication between the employer and his employees, nor was it intended to insulate the "exclusive" representative from criticism even at so delicate a location as the work place.

2. *The labor relations principle of majority rule is embodied in the Wisconsin Municipal Employment Relations Act, Section 111.70* Wis. Stats. (1971).

The Wisconsin Municipal Employment Relations Act, §111.70 *Wis. Stats.* (1971) is patterned after the Federal private sector labor relations model. (B. A. P. 10-17) The Act guarantees the right of public employees to organize for the purpose of engaging in collective bargaining and also secures the right of employees to refrain from any and all such activity. §111.70(2) *Wis. Stats.* (1971). (Compare 29 U.S.C. §157. (B. A. P. 1, 2) It obligates a public employer to bargain with the "exclusive" representative of his employees in an appropriate bargaining unit. §111.70 (2), (4) (d) *Wis. Stats.* (1971). (B. A. P. 16, 17) (Compare 29 U.S.C. §157, (B. A. P. 1,2) 29 U.S.C. §159 (a) B. A. P. 8,9) A public employer will be found guilty of a prohibited labor practice if he refuses to bargain in good faith with the exclusive representative or interferes with the exercise of rights guaranteed by the act. §111.70 (3) (a) 1., 4. (1971). B. A. P. 12, 13, 14). (Compare 29 U.S.C. §159 (a) (B. A. P. 8, 9), 29 U.S.C. §158 (1) (a) (5) (B. A. P. 3) The statute also obligates the employer to bargain regarding matters of wages, hours and other conditions of employment. §111.70 (1) (d) (1971) (B. A. P. 11). (Compare 29 U.S.C. §159 (a) 1. (B. A. P. 8, 9). Finally, the Act preserves the right of public employees to present grievances to their employer. §111.70 (4) (d) (1971) (B. A. P. 16, 17). (Compare 29 U.S.C. §159 (a) (B. A. P. 8, 9).

3. The Wisconsin Supreme Court has decided three cases where it was called upon to apply the "majority rule" principle in public sector labor relations.

In *Board of School Directors v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92, the Wisconsin Supreme Court held *(reversing the WERC)* that a school board properly denied the representative of a minority union the right to speak at a public meeting of the school board on negotiable matters. The court found that the refusal to allow a minority union employee to speak was consistent with the Municipal Employment Relations Act and did not infringe upon his right of free speech as guaranteed by the Wisconsin Constitution. The Court in the *Milwaukee School Directors* case reasoned that had the board allowed the individual to speak, it would have permitted the individual to influence the board and thus the board would have negotiated with someone other than the exclusive representative of its employees. Interestingly enough, the court drew all of these conclusions based solely on a presumption since the individual was never allowed to say anything. Appeal beyond the Wisconsin Supreme Court was not sought in the *Milwaukee School Directors* case.

The Wisconsin Supreme Court had an opportunity to explain its *Milwaukee School Directors* holding in the case of *LaCrosse County Institution Employees v. WERC* (1971), 52 Wis. 2d 295, 190 N.W. 2d 204. In that case the court stated:

> "The essence of the *Board of School Directors* case was merely that, if a municipality sees fit to *bargain* it must do so with the certified representative of the employees and cannot negotiate with a minority union." (Emphasis added) *LaCrosse*, 52 Wis. 2d at 300, 190 N.W. 2d at 207.

The dispute at bar between the City of Madison Board of Education and MTI arose in the state judicial setting just described. The City of Madison Board of Education permitted a teacher other than the exclusive representative to speak on a negotiable subject at a regular public meeting during the portion of the meeting devoted to public appearances. The WERC, faced with the binding precedent of the *Milwaukee School Directors* case, found that the Board committed a prohibited labor practice. The WERC held that when the Board listened to the non-union teacher employee, it negotiated in derogation of the rights of the exclusive representative. Yet, the record clearly establishes that the Board merely listened to the teacher and received results of a petition circulated by the teacher. (A. P. 101, 102, 131)

The Board petitioned for review of the decision by the Dane County Circuit Court. The Circuit Court affirmed the order of the WERC following the precedent of the *Milwaukee School Directors* case. The Circuit Court reasoned as follows:

> "Even though Holmquist's statement superficially appears to be merely a position statement, this court deems from the total circumstances that it constituted 'negotiating'. The court in *Board of School Directors*, supra, at p. 635, stated: 'If the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly 'negotiating'."

The Board appealed to the Wisconsin Supreme Court. The Board challenged the wisdom of the Circuit Court's judgment on constitutional as well as statutory grounds. Justice Day, writing for the majority of the Wisconsin Supreme Court, identified the question on appeal as:

> "Was it error for the Circuit Court to confirm the conclusion of the Wisconsin Employment Relations Commission that the school board committed a prohibited labor practice in that it 'negotiated' or 'bargained' with other than the exclusive bargaining representative of the teachers on matters subject to collective bargaining when it allowed a representative of a minority group of teachers to speak at a board meeting, listened to his statements and received the results of a petition circulated by that group — all concerning matters subject to collective bargaining — when this was done at a regular public meeting of the Board." *City of Madison v. WERC* (1975), 69 Wis. 2d 200 at 202, 231 N.W. 2d 206 at 208. (A. P. 179)

Later, Justice Day states:

> "... the question is whether the activity herein complained of by MTI ... qualifies as bargaining and can therefore be restricted under the rule of the *Board of School Directors v. WERC." City of Madison,* 69 Wis. 2d at 212, 231 N.W. 2d at 213. (A. P. 190)

The Court affirmed the circuit court judgment affirming the order of the WERC following the dubious precedent of the *Milwaukee School Directors* decision. The court held that the Board of Education negotiated with other than the exclusive representative when it permitted a non-union teacher to speak at a regular public meeting of the Board during a portion of the meeting devoted to public appearances. The court was concerned that the speech was about a negotiable subject, and was other than a position statement about the subject. The court felt that the

statement by the non-union teacher went to the very heart of negotiations. "We agree with the trial court that this was in fact negotiating.... The statement given by Mr. Holmquist was more than a mere statement of position; It was an argument for it." *City of Madison,* 69 Wis. 2d at 215, 231 N.W. 2d at 214. (A. P. 193). Simply, the court held that the Board of Education or any public body negotiates with other than the exclusive representative in derogation of its obligations under the Municipal Employment Relations Act if it permits employees to attempt to influence its decision covering a matter subject to collective bargaining at public meetings.

The court found no constitutional infirmity with its decision.

II.

THE WISCONSIN SUPREME COURT DECISION IN *CITY OF MADISON ET AL. v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND MADISON TEACHERS INCORPORATED* MUST BE REVERSED IN THAT THE WISCONSIN COURT FAILED TO PROPERLY RECONCILE AN INDIVIDUAL'S CONSTITUTIONAL RIGHT TO SPEAK FREELY AND PETITION ONE'S GOVERNMENT AND THE CORRELATIVE DUTY OF THAT GOVERNMENT TO RECOGNIZE AND RESPECT THOSE RIGHTS WITH THE STATUTORY RIGHT OF "MAJORITY RULE" IN PUBLIC SECTOR LABOR RELATIONS.

The public sector labor relations environment differs significantly from the private sector labor relations environment in at least two critical ways. First, it is important to remember that the duties, obligations and responsibilities imposed by the United States Constitution on governmental bodies as employers are in addition to and superior to their statutory obligations as municipal employers. Second, the business decisions of governmental bodies are decisions concerning public

business made in a public decision-making framework. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974). In Wisconsin, this aspect of the public decision-making environment is expressed in §66.77 (1) *Wis. Stats.* (1973).

> "... the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business." See also §65.90 *Wis. Stats.* (1973).

These aspects of the public employer decision-making framework also found expression in the rule of the City of Madison Board of Education that allows public appearances at each and every regular Board meeting (A. P. 130).

It is thus axiomatic that the duties imposed by §111.70 of the Wisconsin Statutes must be measured in the context of the rights granted and responsibilities imposed by the Constitution, and with an abiding concern for the special decision-making environment of which public bodies are a part.

The Wisconsin Supreme Court decision upholds an interpretation of the Wisconsin Municipal Employment Relations Act which disregards concern for the constitutional responsibilities of governmental employers and the special decision-making environment imposed on public employers. Under such circumstances, the statute, as interpreted, must fall.

A. The Wisconsin Supreme Court Decision Must Be Reversed In That The Court Seriously Misjudged The Scope Of First Amendment Infringement Allowable Pursuant To The Labor Relations Principle of "Majority Rule".

The City of Madison Board of Education concedes that speech in the form of bargaining or negotiating for a labor agreement at a public meeting can be constitutionally restricted to representatives of the majority bargaining unit. In our view such a limited restriction of free speech avoids the dangers of relative chaos in labor-management relations, promotes industrial peace and the improvement of wages, hours and working conditions by fostering a system of employee organizations and collective bargaining. *Schenk v. United States* (1919), 249 U.S. 47; *West Virginia State Board of Education v. Barnett* (1943), 319 U.S. 624; *Dennis v. United States* (1951), 341 U.S. 494.

However, the Board of Education has never conceded what Justice Day, writing for the Wisconsin Supreme Court majority, identified as the basic issue of the case.

> "... whether or not the activities of the Board at its public meeting constituted bargaining." *City of Madison*, 69 Wis. 2d at 209, 231 N.W. 2d at 211. (A. P. 187).

The Appellant has consistently maintained that labeling the activity engaged in by the Board of Education and Mr. Holmquist at its public meeting as "bargaining" and thus

a prohibited practice is, in the first instance, contrary to the facts; secondly, unsound labor relations law; and thirdly, and most importantly, unsound constitutional law.

> *1. The adoption of the majority rule principle merely sanctions the option of the establishment of a collective bargaining structure to replace the employers privilege of bargaining with any individual or group of employees.*

The Wisconsin Municipal Employment Relations Act sanctions the option of, and provides a method by which Wisconsin municipal employees may establish a collective bargaining relationship with their municipal employer. §111.70 *Wis. Stats.* (1971) (B. A. P. 10-17). If such an option is adopted by the employees in an appropriate unit, the employer is then obligated to collectively bargain with the representatives of that unit and refrain from bargaining with any other individual employee or group of employees regarding wages, hours and other conditions of employment. §111.70 (2), (4) (d) *Wis. Stats.* (1971) (B. A. P. 16, 17). Thus, "majority rule" merely replaces whatever rights an individual employee theretofore had to bargain individually by establishing a democratic procedure whereby he and his fellow workers in an appropriate unit participate in making decisions governing their working conditions by voting as to *which* union shall represent them and by shaping the policies of that union by membership therein. Weyand, *supra*, p. 561.

The doctrine of "majority rule" makes the individual employee a citizen in an industrial democracy. However, it must be remembered that the industrial democracy established by majority rule recognizes the importance of minority rights in maintaining the vitality of the industrial democracy. Just as the majority rule principle of political democracy recognizes individual rights, the Municipal Employment Relations Act preserves the right of individual employees to present grievances to their employer. §111.70 (4) (d) *Wis. Stats.* (1971) (B. A. P. 16, 17).

Further, the adoption of the "majority rule" principle was never intended to insulate the certified representative from criticism, challenge, or even repudiation by members of the collective bargaining unit. This Court recognized the importance of this aspect of the "majority rule" principle in the recent case of *Magnavox v. NLRB* (1974), 415 U.S. 322. (Rehearing Denied, 416 U.S. 952 (1974). In *Magnavox* the Court held that a certified representative could not contractually waive the rights of employees to distribute literature regarding the employer-employee relationship without seriously diluting the rights of employees to exercise the options granted by the labor law to freely choose who shall represent them or whether they shall be represented.

It is clear, therefore, that the replacement of individual bargaining by collective bargaining was never intended to totally restrict communication between the employer and his employees. Further, the "majority rule" theory recognizes the wisdom of promoting communication between employees to insure the vitality of the industrial democracy it establishes.

It is thus incumbent upon administrative and judicial bodies to precisely define the type of activity which constitutes bargaining since that definition will have impact on the vitality of the industrial democracy established by the acceptance of the principle of "majority rule". A broad definition of bargaining or bargaining subjects to include any communication between employer and employee and employee and employee will undermine the statutorily guaranteed rights of a minority to present grievances to their employer, and for employees to freely choose their representatives. The Wisconsin Supreme Court decision which prohibits employees from speaking at public meetings to their employer is an example of an unsound application of the "majority rule" principle especially when that decision is analyzed in the context of public sector labor relations environment.

2. *The Wisconsin Supreme Court decision incorrectly interprets the labor relations majority rule principle as mandating not only that employers cease and desist from negotiating with individuals or groups of employees but also cease and desist from merely listening to individuals or groups of employees.*

School Boards are obligated to recognize and respect the constitutional rights of their employees. *Tinker v. Des Moines*, supra, *Pickering v. Board of Education*, supra, *Wood v. Strickland*, supra. These obligations are, it must

be remembered, in addition to and superior to a board of education's statutory obligations as a municipal employer. All teachers employed by Board of Education Joint School District No. 8 possess the rights to speak freely and to petition possessed by other citizens. However, only Madison Teachers Incorporated, the exclusive representative of the teachers of the district, possesses the right to bargain with the Board of Education.

The Wisconsin Supreme Court decision in this case is constitutionally defective because it equates mere speaking and listening with other than the exclusive representative to bargaining with other than the exclusive representative. Yet the Wisconsin Supreme Court states:

> "To the extent that the WERC and circuit court decisions in this case infringe upon the freedoms to speak and petition the federal and state governments, they are within the limits imposed on the restriction of those rights by the United States Supreme Court decisions, and the decisions of this court." *City of Madison*, 69 Wis. 2d at 211, 231 N.W. 2d at 212. (A.P. 188, 89)

The court cites the case of *Medo Photo Supply Corporation v. NLRB* (1944), 321 U.S. 678 to support this proposition. In *Medo* this Court held that an employer who bargains with other than the "exclusive" representative of his employees commits an unfair labor practice. The *Medo* case is of crucial importance to the case at bar, however, not because of the majority rule principle it establishes, which is conceded by every party, but because this Court therein considers the type of private sector employer activities which can properly be judged "negotiating" with other than the exclusive bargaining representative. In the *Medo* case, the employer conferred with dissident employees so

as to arrive at a settlement on the matter of wages. The employer refused to negotiate with the exclusive representative on matters of wages, hours and working conditions. The *Medo* case stands for the proposition that negotiations with other than the exclusive representative involve more than an employer listening to dissident employees.

In the case at bar, a teacher was allowed to speak at a regular public meeting of the City of Madison Board of Education. (A. P. 130). Review of his comments indicates he specifically recognized the validity of the existing bargaining relationship between the Madison Board of Education and Madison Teachers Incorporated, the certified representative of district teachers. (A. P. 130, 131). Indeed, his remarks were addressed to both parties. (A. P. 130). The speaker merely provided the bargaining parties with information about certain teachers' feelings on a subject being negotiated by the parties. (A. P. 130, 131). He never sought to displace the exclusive representative. (A. P. 130, 131). The Board of Education merely listened to his remarks. (A. P. 131-132). The only oral exchange between Mr. Holmquist and the Board was a question of the president at the conclusion of his talk as to whether or not he intended to communicate the petition he had read to the Board of Education. (A. P. 131). No other meetings or discussions occurred between Mr. Holmquist and the Board of Education or its members. (A.P. 132). Indeed the whole matter of "fair share" was negotiated with Madison Teachers Incorporated and tentative agreement reached with the exclusive representative of the teachers the next day. (A. P. 132).

The Board of Education never conferred with employees so as to arrive at a settlement on "fair share". The Board of Education never refused to bargain the matter of fair share with Madison Teachers Incorporated. Indeed, the record clearly establishes that the issue of "fair share" was settled at the bargaining table by Madison Teachers Incorporated and the Board of Education. (A. P. 132)

The Wisconsin Supreme Court perverted the labor relations theory of "majority rule" and this Court's holding in the *Medo* case when it held that a public employer who listens to his employees is negotiating with them. The definition of negotiation adopted by the Wisconsin Supreme Court must be rejected simply because, contrary to the court's conclusion, the infringement upon the freedom to speak and petition it sanctions is *far beyond* the limits ever imposed on the restriction of those rights by the United States Supreme Court. Professor Clyde W. Summers summarizes this argument well:

> "... Public sector bargaining is part of the governmental process and the responsible political officials are entitled, if not obligated, to listen to the views of all those who have an interest in the decision. Listening to the views of a spokesman for a group of employees does not constitute bargaining, for it gives the spokesman no different status or access to the political process than any other citizen. It does not reduce the advantages which the majority union obtains by access to the special structure and procedures of collective bargaining. At most, it reduces the majority union's ability to conceal the fact that employees do not unanimously support its position on every demand.

> "Exclusive recognition has never, in law or in fact, guaranteed the majority union any such right to conceal. The establishment of collective bargaining in the public sector, as a method of governmental decision making, should certainly not have the effect of obstructing public disclosure of facts and views relevant to the political decision to be made." Summers, *Public Employee Bargaining: A Political Perspective* 83 Yale L.J. 1156 at 1198 and 1199 (1974).

B. The Wisconsin Supreme Court Decision Must Also Be Reversed Since The Order Affirmed By The Court Is Constitutionally Defective.

The order of the Wisconsin Employment Relations Commission affirmed by the Wisconsin Supreme Court reads as follows:

> "It is ordered that Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8 et al.:
>
> 1. Shall immediately cease and desist from permitting employees other than representatives of Madison Teachers Incorporated to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Incorporated.
> 2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act ...

(b) Immediately notify Madison Teachers Incorporated that they will not permit any employee in the bargaining unit represented by Madison Teachers Incorporated other than a representative of Madison Teachers Incorporated to appear and speak on matters subject to collective bargaining between them and Madison Teachers Incorporated." (A. P. 134-135).

This order is clearly constitutionally defective.

1. The order imposes a constitutionally impermissible prior restraint on pure speech.

The order is a predetermined categorical denial of the speech related activity, and as such, must be considered a prior restraint. The order mandates that the Board of Education refuse a teacher who is not a representative of the exclusive bargaining unit, the opportunity to speak at regular meetings on matters subject to collective bargaining. Thus, the Board is expected to prevent certain teachers from utilizing the public forum provided to other members of the community. Any system of prior restraint against expression bears a heavy burden against its constitutional validity. *United States v. Washington Post Co.* (1971), 403 U.S. 713.

In *Southwest Promotions Ltd. v. Conrad* (1975), 420 U.S. 546, this Court held that the rejection of an application for the use of a public forum accomplished a prior restraint lacking in constitutionally required

procedural safeguards. In its opinion, this Court identified the problem with prior restraint of speech:

> "Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship — reflecting the natural distaste of a free people — is deep-written in our law." 420 U.S. at 553.

The constitutional infirmity of the prior restraint imposed by the WERC Order is not removed because it simply prevents certain teachers from exercising their freedom of expression in only one particular public forum. One is not to have the exercise of his liberty abridged on the plea that it may be exercised in some other place, thus access to other forums does not justify an otherwise impermissible restraint on speech. *Conrad,* supra, 400 U.S. 546, 556. Clearly, Mr. Holmquist could have addressed the issues in other public forums. His First Amendment rights require that he be allowed to do so and what he had to say in protected speech under the First Amendment. Under the decision of the Wisconsin Supreme Court in *City of Madison*, his speech, permissible in other forums, is excluded from a particular public forum, solely because it is a school board which has provided the forum. Prior restraint cannot be justified on the basis that governmental officials would find a different forum more convenient or less likely to create a disturbance.

The system of prior restraint imposed by the Wisconsin Supreme Court is simply incapable of bearing

the heavy burden against its constitutional validity in that it fails to provide precise and clear standards as to whom will be permitted to speak and upon what matters of public concern.

2. *The order attempts to restrict a broader range of speech activities than is constitutionally acceptable.*

A central theme in this Court's concern with overbreadth and its relationship to First Amendment rights is that when a statute is overbroad, there is a potential for sweeping and improper application in areas of First Amendment rights. *Goodling v. Wilson* (1972), 405 U.S. 518. When a statute is directed at "pure speech" and especially the expressive content of speech, a statute should be closely scrutinized because of its potential deterrence to the exercise of First Amendment rights. An ordinance may be overbroad if it prohibits constitutionally protected conduct. *Grayned v. City of Rockford* (1972), 408 U.S. 104. As emphasized earlier, the concept of negotiation and the exclusive bargaining rights of the majority representative established by state law under the Wisconsin Supreme Court's holding infringes on the rights of a minority member to have access to a public forum, and the corresponding duty of the School Board to make that forum available on an evenhanded basis. The order is thus overbroad in that it restricts pure speech as opposed to restricting bargaining with the Board of Education at its regular public meeting in derogation of the rights of the exclusive representative.

In addition, "matters subject to collective bargaining", although defined by statute, is a very broad term under Wisconsin labor law. Prohibition of public comment to the School Board on these subjects by minority representatives clearly infringes on their right to comment on subjects protected by *Pickering v. Board of Education* (1968), 391 U.S. 563. This problem is further complicated by the risk of personal liability if members of the Board of Education violate the constitutional rights of their employees. *Wood v. Strickland* (1974), 420 U.S. 308. Thus, the Wisconsin Supreme Court decision places Board members in the dilemma of violating the Wisconsin Employment Relations Commission order or denying First Amendment and Fourteenth Amendment rights to teacher employees. The overbreadth of the Wisconsin statute thus has a chilling effect on the School Board's access to vital information which, as public officials, they have an obligation to listen to and consider.

3. *The order must be voided as constitutionally vague since its prohibitions are not clearly defined.*

An enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford* (1972), 408 U.S. 104. Justice Robert Hansen, in dissent, eloquently states the concern of the appellants with the vagueness of the department order.

> "In the First Amendment context, the question of scope or uncertainty as to the future application (of an order) goes to the chilling effect of the order upon the right of free speech. The Employment Relations Board

concluded that when a teacher asks to speak to the Board during a public discussion period at a regular Board meeting, the Board must inquire as to the nature of the speech. Then, if the topic is a matter subject to collective bargaining, the Board must refuse to allow the teacher to speak. What matters are subject to collective bargaining? The statute provides that a municipal employer must bargain in good faith on matters of wages, hours, and working conditions. As Appellant suggests, certain questions arise. Suppose the teacher wishes to speak on class size or teacher aides, the establishment of summer programs, school reading projects, in-service training or the special treatment and handling of problem students. Are these matters subject to collective bargaining on which the Board is restricted from receiving information from teachers other than the majority representative of its employees? Nothing in the Municipal Employment Relations Act suggests that a teacher does not have a right to speak at public meetings on these matters. Yet all could be covered or affected by a collective bargaining agreement. It is in this sense that the Department order is vague, not meaning that it cannot be understood and applied by this School Board to the facts here, but because the difficulty of locating its outer limits will have a chilling effect both on the rights of teachers to speak and school boards to listen on subjects arguably relatable to bargaining, but directly concerned with the well-being of school children and the community. The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in doubt topics, and this is what is meant by having a chilling effect. The writer would hold the order in its scope and breadth, to have a constitutionally impermissible temperature-lowering effect on the exercise of First Amendment rights." *City of Madison* 69 Wis. 2d at 222, 223; 231 N.W. 2d at 218. (A. P. 202, 203).

4. *The order cannot be allowed to stand since it mandates that school boards reject their constitutional obligation to provide a neutral public forum for the expression of ideas.*

A central issue in the discussion of the First Amendment with respect to the WERC order is whether a state or local authority may permit or require only one side of public employee labor disputes to be heard in a public forum and exclude another group wishing to present another viewpoint in the forum. The case most clearly in point with respect to this issue is *Police Dept. of City of Chicago v. Mosley* (1972), 408 U.S. 92. In the *Mosley* case a Chicago city ordinance prohibited all picketing within 150 feet of a school except peaceful labor picketing of any school involved in a labor dispute. Mosley had engaged in the picketing of a high school protesting racial discrimination and sought declaratory and injunctive relief in federal court. The Supreme Court held that the city ordinance makes an impermissible distinction between labor picketing and other picketing.

In the *City of Madison* case, under the WERC order certain groups are afforded access to a public forum to speak on labor relation matters while other groups are prohibited from speaking on these same subjects. The conduct sought to be regulated is pure speech and there can be no doubt that it is within the First Amendment's protection unless a substantial governmental interest can be served in the discrimination among those permitted to

speak. However, even where regulation serves a substantial governmental interest, the regulation must do so in a manner consistent with the Equal Protection Clause.

The WERC ruling specifically allows the exclusive bargaining agent to speak at Board meetings. This ruling does not prohibit the discussion of bargaining issues at open Board of Education meetings; rather, it controls who may speak on matters which may be subject to labor negotiation. Thus, the order is a clear departure from neutrality and one which seeks to control the content of what is said about matters subject to labor negotiation. This Court has condemned such content control:

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.
>
> "Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression." (Footnote omitted.) *Mosley* 408 U.S. at 99.

The WERC Order which is allegedly based upon a desire to maintain labor peace, cannot stand even though

it may be based on a legitimate governmental concern because it is a departure from the evenhanded control of access to a public forum which is required of a governmental body under *Mosley*.

This Court recently summarized the obligations of a municipality regarding access to a public forum in *Hudgens v. NLRB* (1976), 96 S.Ct. 1029. In that case the Court stated that when state action is involved, a court's duty is to apply the standards of the First Amendment which requires "above all else" that expression must not be restricted by government "because of its message, its ideas, its subject matter or its content." *Hudgens v. NLRB* 96 S.Ct. at 1037.

There can be no question that a school board meeting, a portion of which is devoted to public comment, is a First Amendment forum of the purest kind. American tradition favors free and open debate in the town hall meeting as much as it favors a politically neutral military. *Greer v. Spock* (1976), 44 U.S.L.W. 4380. None of the special reasons for limiting First Amendment rights exist at a community school board meeting which may exist within an institution such as a prison or a school. There is an equality of status in the field of ideas, and once the forum is opened up by government, the government must afford all points of view an equal opportunity to be heard.

In determining whether a speech may be limited with respect to a particular forum, the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. *Grayned v. City of Rockford* 408 U.S. 104 at 116. While the timing of the statement by Mr. Holmquist may have been unfortunate for MTI, there is no

question that his manner of expression (i.e., speech) was compatible with the normal activity of that particular place at that particular time (public comment directed at board members). Simply, this Court must reject an order which requires a governmental body to selectively listen when it is charged with deciding public business in a public forum.

III.

A VALID RECONCILIATION OF CONSTITUTIONAL RIGHTS TO SPEAK AND PETITION WITH THE LABOR RELATIONS DOCTRINE OF MAJORITY RULE WILL AT THE LEAST PROVIDE THAT A PUBLIC EMPLOYER MAY LISTEN TO ANY AND ALL EMPLOYEES REGARDING NEGOTIABLE MATTERS, RECEIVE INFORMATION, THOUGHTS, OR SENTIMENTS FROM ALL EMPLOYEES EVEN WHEN THE EXCLUSIVE REPRESENTATIVE IS ABSENT AS LONG AS THE PUBLIC EMPLOYER REFRAINS FROM EVIDENCING AN EXPRESS OR IMPLIED DESIRE TO DEAL DIRECTLY WITH EMPLOYEES AND REFRAINS FROM ACTION SOLICITING OR INDUCING EMPLOYEES TO DEAL DIRECTLY WITH IT.

Federal case law outlines the nature of a private employer's duty to bargain exclusively with the majority representative of his employees, and also indicates under what circumstances a private employer will be found to have violated the principle of "majority rule". The cases

indicate that a private employer may receive information concerning bargaining matters from employees, discuss matters subject to collective bargaining with members of the bargaining unit other than the exclusive representative of its employees, and listen to negative information about the majority representative without violating its duty to bargain or interferring with the bargaining rights of its employees. A private employer, however, must refrain from evidencing an express or implied desire to deal directly with the employees and refrain from engaging in affirmative action, soliciting or inducing the employees to deal directly with him. The fact that information received concerning negotiable issues may influence the decision of the employer in bargaining with the exclusive representative does not translate receipt of information from third parties into "bargaining" or "negotiating" with third parties to the exclusion of the certified representative. *White Sulphur Springs Co. v. NLRB* 136 NLRB 375, 49 LRRM 1778 enforced as modified, 316 F. 2d 410, (CADC, (1963)), 52 LRRM 2608 (1962); *Lawn Boy Div., Outboard Marine Corp.* (1963), 143 NLRB 535, 53 LRRM 1342; *Coast Radio Broadcasting Corp.* (1965), 151 NLRB 117, 58 LRRM 1574; *American Printing Co. and International Pressmen Association Union* (1968), 173 NLRB 17, 69 LRRM 1238; *Tabasco Prestressed Concrete Co.* (1969), 177 NLRB 101, 71 LRRM 1565.

Admittedly the cases cited are decisions of the National Labor Relations Board. However, these decisions are consistent with the scope of the theory of "majority rule" reviewed earlier in the brief. Further, remember the Wisconsin Legislature embraced this theory in adopting the Municipal Employment Relations Act. Therefore, the reconciliation of employee rights within the industrial

democracy established by the acceptance of "majority rule" in private sector labor relations is a solid starting point for developing the reconciliation of individual employee rights in the public sector labor relations environment.

Adoption of the principle that public employers may listen to employees and receive information from their employees on all matters as long as the public employer refrains from evidencing an express or implied desire to deal directly with its employees and refrains from action soliciting or inducing employees to deal directly with him, recognizes and promotes the unfettered exchange of ideas underlying the constitutional protections of speech and petition. *New York Times v. Sullivan* (1964), 376 U.S. 254. Further, the adoption of such a rule would allow the widest room for discussion and the narrowest range for its restriction which is of fundamental importance to our democratic society and consistent with our profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.

Simply, a reconciliation of constitutional rights and the labor relations doctrine of "majority rule" in the public sector which allows public employers to merely listen is not only sound labor relations law but also, more importantly, sound constitutional law.

CONCLUSION

Section 111.70 (3) (a) 1. and 4. of the Wisconsin Statutes, as interpreted by the Wisconsin Supreme Court unconstitutionally intrudes on the rights guaranteed individuals and obligations imposed on governmental

bodies by the First Amendment. The governmental interest in promoting stable labor relations in the public sector falls far short of providing adequate basis for denying individuals other than an exclusive bargaining representative from appearing and speaking at regular public meetings of a governmental body which seeks comment on matters of concern to the well being of the community and school children. A public employer must be able to listen to any of its employees, without having to be concerned that to do so would violate his duty to bargain solely with the employees exclusive representative. Indeed, such a reconciliation of the competing interests in this case is the only result which will promote sound public sector employment relationships and preserve the sanctity and sanction of the liberties embraced by the First Amendment.

The judgment of the Wisconsin Supreme Court must be reversed.

Respectfully submitted,

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APPENDIX TO BRIEF

Relevant Federal Statutes
29 USC

§141. Short title; Congressional declaration of purpose and policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 USC

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

29 USC

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by

any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative

of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to

recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representative may not appropriately be raised under section 159 (c) of this title,

(B) where within the preceding twelve months a valid election under section 159 (c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159 (c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159 (c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in

the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification — ...

29 USC

§159. Representatives and elections — Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other

conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards

if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Secret ballot; limitation of elections

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158 (a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Relevant WISCONSIN STATUTES

Section 111.70 Wis. Stats. (1971)

111.70 Municipal employment. (1) DEFINITIONS. As used in this subchapter:

(a) "Municipal employer" means any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied.

(b) "Municipal employe" means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

(c) "Commission" means the employment relations commission.

(d) "Collective bargaining" means the performance of the mutual obligation of a municipal employer through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality. its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.

(h) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues

uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.

(j) "Labor organization" means any employe organization in which employes participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

(k) "Person" means one or more individuals, labor organizations, associations, corporations or legal representatives.

(m) "Prohibited practice" means any practice prohibited under this subchapter.

(n) "Referendum" means a proceeding conducted by the commission in which employes in a collective bargaining unit may cast a secret ballot on the question of authorizing a labor organization and the employer to continue a fair-share agreement. Unless a majority of the eligible employes vote in favor of the fair-share agreement, it shall be deemed terminated and that portion of the collective bargaining agreement deemed null and void.

(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

2. To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it, but the employer shall not be prohibited from reimbursing its employes at their prevailing wage rate for the time spent conferring with the employes, officers or agents. Supervisors may remain members of the same labor organization of which their subordinates are members, but such supervisor shall not participate in determinations of the collective bargaining policies of such labor organization or resolution of grievances of employes. After January 1, 1974, said supervisors shall not remain members of such organizations.

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that

support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

6. To deduct labor organization dues from an employe's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefore, signed by the municipal employe personally, and terminable by at least the end of any year of its life or earlier by the municipal employe giving at least 30 days' written notice of such termination to the municipal employer and to the representative organization, except where there is a fair-share agreement in effect.

(b) It is a prohibited practice for a municipal employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2).

2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employes which would constitute a prohibited practice if undertaken by him on his own initiative.

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

5. To coerce or intimidate an independent contractor, supervisor, confidential, managerial or executive employe, officer or agent of the municipal employer, to induce him to become a member of the labor organization of which employes are members.

(4) POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

(a) *Prevention of prohibited practices.* Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in s. 111.07 the term "prohibited practices" shall be substituted.

(b) *Failure to bargain.* Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

(d) Selection of representatives and determination of appropriate units for collective bargaining. 1. A representative chosen for the purposes of collective bargaining by a majority of the municipal employes voting in a collective bargaining unit shall be the exclusive representative of all employes in the unit for the purpose of collective bargaining. Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting

from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer.

2. a. The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Before making its determination, the commission may provide an opportunity for the employes concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit. The commission shall not decide, however, that any unit is appropriate if the unit includes both professional employes and nonprofessional employes, unless a majority of the professional employes vote for inclusion in the unit. The commission shall not decide that any unit is appropriate if the unit includes both craft and noncraft employes unless a majority of the craft employes vote for inclusion in the unit. Any vote taken under this subsection shall be by secret ballot.